



OFFICE OF THE POLICE COMMISSIONER
ONE POLICE PLAZA • ROOM 1400

February 20, 2018

Memorandum for: Deputy Commissioner, Trials

Re: **Police Officer Wayne Roach**
Tax Registry No. 940645
Manhattan Court Section
Disciplinary Case No. 2015-14794

The above named member of the service appeared before Assistant Deputy Commissioner Nancy R. Ryan on December 8, 2017 and December 11, 2017, charged with the following:

DISCIPLINARY CASE NO. 2015-14794

1. Said Police Officer Wayne Roach, assigned to Transit Bureau-District 4, while off-duty, on or about November 30, 2015, within the confines of the [REDACTED] Precinct, in Bronx County, New York, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department in that said Police Officer Roach did wrongfully operate a motor vehicle while his ability was impaired by an intoxicant.

2. Said Police Officer Wayne Roach, assigned to Transit Bureau-District 4, while off-duty, on or about November 30, 2015, within the confines of the [REDACTED] Precinct, in Bronx County, New York, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department in that said Police Officer Roach did wrongfully operate a motor vehicle while under the influence of an intoxicant.

**P.G. 203-10, Page 1, Paragraph 5 GENERAL REGULATIONS
NYS VTL Section 1192(1) – OPERATING A MOTOR VEHICLE WHILE UNDER
THE INFLUENCE OF ALCOHOL**

3. Said Police Officer Wayne Roach, assigned to Transit Bureau-District 4, while off-duty, on or about November 30, 2015, within the confines of the █ Precinct, in Bronx County, New York, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department in that said Police Officer Roach did consume an intoxicant to the extent that said Police Officer was unfit for duty.

P.G. 203-10, Page 1, Paragraph 5**PUBLIC CONTACT –
PROHIBITED CONDUCT
GENERAL REGULATIONS**

4. Said Police Officer Wayne Roach, assigned to Transit Bureau-District 4, while off-duty, on or about November 30, 2015, within the confines of the █ Precinct, in Bronx County, New York, did wrongfully engage in conduct prejudicial to the good order, efficiency, or discipline of the Department, to wit: said Police Officer Roach having been arrested for Driving While Intoxicated, refused to submit to a blood test. (*As amended at trial*)

P.G. 203-10, Page 1, Paragraph 5**PUBLIC CONTACT –
PROHIBITED CONDUCT
GENERAL REGULATIONS**

5. Said Police Officer Wayne Roach, assigned to Transit Bureau-District 4, while off-duty, on or about November 30, 2015, within the confines of the █ Precinct, in Bronx County, New York, did wrongfully engage in conduct prejudicial to the good order, efficiency, or discipline of the Department, to wit: said Police Officer Roach was observed exposing himself in public.

P.G. 203-10, Page 1, Paragraph 5**PUBLIC CONTACT –
PROHIBITED CONDUCT
GENERAL REGULATIONS**

In a Memorandum dated January 29, 2018, Assistant Deputy Commissioner Nancy R. Ryan found Police Officer Roach Guilty of all Specifications in Disciplinary Case No. 2015-14794. Having read the Memorandum and analyzed the facts of this matter, I approve the findings, but disapprove the penalty.

I have considered the totality of the circumstances and issues concerning the misconduct for which Police Officer Roach has been found Guilty and deem that separation from the Department is warranted. However, instead of an outright dismissal from the Department, I will permit an alternative manner of separation from the Department for Police Officer Roach at this time.

It is therefore directed that an *immediate* post-trial negotiated agreement be implemented with Police Officer Roach in which he shall immediately file for vested-interest retirement, forfeit thirty (30) suspension days (previously served), forfeit thirty (30) suspension days (to be served), waive all time and leave balances, including terminal leave, and waive all suspension days, with and without pay, if any, and be placed on one (1) year dismissal probation.

Such vested-interest retirement shall also include Police Officer Roach's written agreement to not initiate administrative applications or judicial proceedings against the New York City Police Department to seek reinstatement or return to the Department. If Police Officer Roach does not agree to the terms of this vested interest retirement agreement as noted, this Office is to be notified without delay. This agreement is to be implemented **IMMEDIATELY**.



James P. O'Neill
Police Commissioner



POLICE DEPARTMENT

January 29, 2018

-----X-----
In the Matter of the Charges and Specifications : Case No.
- against - : 2015-14794
Police Officer Wayne Roach :
Tax Registry No. 940645 :
Manhattan Court Section :

-----X-----
At: Police Headquarters
One Police Plaza
New York, New York 10038

Before: Honorable Nancy R. Ryan
Assistant Deputy Commissioner Trials

APPEARANCE:

For the Department: Jamie Moran, Esq.
Department Advocate's Office
One Police Plaza, 4th Floor
New York, NY 10038

For the Respondent: John P. Tynan, Esq.
Worth, Longworth & London, LLP
111 John Street, Suite 640
New York, NY 10038

To:

HONORABLE JAMES P. O'NEILL
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

Charges and Specifications:

1. Said Police Officer Wayne Roach, assigned to Transit Bureau- District 4, while off-duty, on or about November 30, 2015, within the confines of the █ Precinct, in Bronx County, New York, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department in that said Police Officer Roach did wrongfully operate a motor vehicle while his ability was impaired by an intoxicant.

P.G. 203-10, Page 1, Paragraph 5 - GENERAL REGULATIONS
NYS VTL Section 1192 (1) – OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL

2. Said Police Officer Wayne Roach, assigned to Transit Bureau- District 4, while off-duty, on or about November 30, 2015, within the confines of the █ Precinct, in Bronx County, New York, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department in that said Police Officer Roach did wrongfully operate a motor vehicle while under the influence of an intoxicant.

P.G. 203-10, Page 1, Paragraph 5 - GENERAL REGULATIONS
NYS VTL Section 1192 (1) – OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL OR DRUGS

3. Said Police Officer Wayne Roach, assigned to Transit Bureau- District 4, while off-duty, on or about November 30, 2015, within the confines of the █ Precinct, in Bronx County, New York, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department in that said Police Officer Roach did consume an intoxicant to the extent that said Police Officer was unfit for duty.

P.G. 203-04, Page 1, Paragraph 2 – PUBLIC CONTACT – PROHIBITED CONDUCT
GENERAL REGULATIONS

4. Said Police Officer Wayne Roach, assigned to Transit Bureau- District 4, while off-duty, on or about November 30, 2015, within the confines of the █ Precinct, in Bronx County, New York, did wrongfully engage in conduct prejudicial to the good order, efficiency, or discipline of the Department, to wit: said Police Officer Roach, having been arrested for Driving While Intoxicated, refused to submit to a blood test. *(As amended at trial).*

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT
GENERAL REGULATIONS

5. Said Police Officer Wayne Roach, assigned to Transit Bureau- District 4, while off-duty, on or about November 30, 2015, within the confines of the [REDACTED] Precinct, in Bronx County, New York, did wrongfully engage in conduct prejudicial to the good order, efficiency, or discipline of the Department, to wit: said Police Officer Roach was observed exposing himself in public.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT PROHIBITED CONDUCT GENERAL REGULATIONS

REPORT AND RECOMMENDATION

The above named member of the Department appeared before the Court on December 8, 2017 and December 11, 2017. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, assessing the credibility of the witnesses, the Court finds Respondent Guilty of all specifications.

FINDINGS AND ANALYSIS

The following is a summary of the undisputed facts. In the early morning hours of November 30, 2015, Respondent finished his tour of duty and traveled with a friend from his command in Union Square, Manhattan to an unnamed Spanish restaurant in the Bronx. He remained there from approximately 0100 until after 0400 hours, consuming alcoholic beverages during this time. Respondent then drove his friend back to his car in the Union Square area before heading back to A b orough with a plan to stay at his then-girlfriend's residence. Respondent resided X Borough and was scheduled to work the next day. He failed to connect with his girlfriend via phone when he arrived after 0500 hours and thus did not gain

access to her residence at [REDACTED] which was located near [REDACTED] School, a pre-K to 5th grade elementary school, at [REDACTED] (Tr. 225-29, 245)

After texting his girlfriend, Respondent opted to remain on [REDACTED] and rest in his car, keeping the engine on due to the cold outdoor temperature. He parked between the residence and the school, positioning himself on a hazard line. He reclined his seat back and fell asleep. At some point, Respondent opened the driver's side door, turned to the side and urinated out the door. He was unsuccessful in pulling his pants back up and his penis was exposed. (Tr. 229-32, 237)

Around 1000 hours, School Safety Agent Deborah Waters was notified by parents of schoolchildren that there was a sleeping man parked outside in a green, two door Honda, exposing himself. Waters approached the car and tried to wake Respondent but was unsuccessful. She then called the Borough requesting a supervisor. School Safety Agent Taft Tramble responded soon thereafter. He also unsuccessfully attempted to wake Respondent before reaching into the car and removing Respondent's keys from the ignition and his NYPD parking plaque from the dashboard. Tramble then called for a police response. (Tr. 16-27, 69-78)

Sergeant Luis Pena responded to the scene and was able to wake Respondent, who stepped out of the vehicle and identified himself as a Member of the Service. Pena advised Patrol Borough Bronx duty captain, Captain Andre Brown, that there was an incident with an off-duty MOS who had been observed exposing himself in the immediate vicinity of public school and a possible DWI. Brown responded to the scene and, after interacting with and observing Respondent and speaking to the school safety agents, determined he was unfit for duty and directed Pena to arrest him for driving while intoxicated and public lewdness. Respondent

was taken to Jacobi Hospital where he refused to submit to a blood test and refused again after being advised of potential consequences. (Tr. 109-17, 194-97; Dep't Ex. 2)

Ultimately, Respondent pled guilty to public lewdness and paid a fine. His driver's license was restored by the Department of Motor Vehicles after a hearing before an ALJ at which Sergeant Pena testified. (Tr. 199-200, 235-36)

Respondent stands charged with wrongfully operating a motor vehicle while under the influence of an intoxicant, wrongfully operating a motor vehicle while impaired by alcohol, consuming an intoxicant to the extent that he was unfit for duty, refusing to submit to the blood test and exposing himself in public. At trial, he admitted to refusing the blood test and to the fact that his penis was exposed, though he contended his belt buckle was malfunctioning and he was unaware that his pants were not pulled up while he slept. He denied being drunk or intoxicated and maintained that, though he was extremely tired, he was fit for duty.

School Safety Agent Deborah Waters, the first witness to observe Respondent on the incident morning, testified for the Department. After being advised by a parent that there was a man in the car outside the school exposing himself, Waters went outside and looked into the car, which she testified was parked in an illegal hazard zone with the key in the ignition and sound emanating from the engine. She explained that there were "community parking" spaces near the school but Respondent was in "the triangle where you can't park" in the middle of the street. She recalled seeing a "guy [in the driver's seat] asleep and part of his genitals was exposed" through his boxers. She identified this man as Respondent for the tribunal. SSA Waters specified that Respondent had his seat "pulled back a little bit," his leather jacket pulled over his head and his pants "almost like to his thighs." (Tr. 15-18, 27, 35-40, 50)

For about ten minutes, she knocked on the hood and all four windows on both sides with her knuckles, but was unsuccessful in waking him up. She went inside the school and called her Borough office to inquire about how to call this in over the radio, then waited inside the building for a supervisor, SSA Tramble, who arrived around 1030. Together, they again attempted to wake Respondent by knocking on the hood, the windows, and the back of the trunk to no avail. She observed Tramble remove the keys from the ignition and a NYPD parking plaque from the front window. After again going inside to call her supervisor, Waters subsequently observed Respondent standing next to the car with Officer Rodriguez and Sergeant Pena holding him on his sides. Waters testified that Respondent was not swaying, but remembered that his eyes were a "little red." She approached the car and stood in the street about two to three feet from Respondent, but they did not interact. (Tr. 20-32, 40-46, 50-53)

On cross, SSA Waters denied seeing any alcohol or vomit in or around the car. She did not observe any damage nor did she smell any alcohol, though she noted she was not in the car at any point. She did not hear Respondent speak. She confirmed that she previously had answered affirmatively when she was interviewed by Department investigators, and asked whether Respondent looked alert once he was out of the vehicle. (Tr. 41, 49, 54, 57)

SSA Taft Tramble, echoed much of Waters' testimony. Upon arrival, he approached the passenger side of the vehicle and saw an unresponsive male on the driver's side of the vehicle with the seat reclined back slightly with his face covered and his penis exposed with his pants down below his waist. He recalled it was very cold and that he was able to tell that the car was running because "exhaust was coming and you [could] hear the engine." He shook the car in a rocking motion to try to get the man, who he identified as Respondent, to stir, knocked on both the passenger and driver's side windows, eventually loudly banging on the driver's side window,

but got no response to any of these attempts. He realized as he rocked the car that the lock was "partially ajar" so he opened the driver's side door, reached in and removed the keys from the ignition. He also removed a NYPD Transit Bureau plaque from the dashboard. He nudged Respondent on his upper left side to check if he was breathing and after a few attempts, saw his unclothed stomach rise. When this attempt to wake Respondent failed, he called for a police response. After he put that call over the radio, he "pushed him again ... [saw] his stomach rise and went back [over the radio] and let them know we did have shallow breathing but we still need EMS." He confirmed, however, that EMS did not respond to the scene. (Tr. 69-78, 91-92, 103-04)

After police responded and the officers woke Respondent, Tramble handed Sergeant Pena the parking plaque and keys. He had no direct interaction with Respondent and stated he was "not too close to him." His impression of Respondent from what he did observe was that he was "disoriented." He agreed on cross that he did not smell alcohol nor did he observe any damage to the vehicle. He said he could not speak to whether Respondent's speech was incoherent, but reiterated "he was just really disorientated and asked what was going on." He confirmed that he told investigators that Respondent pulled his pants up and presented his ID when asked. (Tr. 94-98, 103-04)

Captain Andre Brown also testified for the Department. On the date in question, he was working as the Executive Officer of the ■ precinct, serving as the Patrol Borough Bronx duty captain for the day tour. He responded to the incident scene at 1145 hours after being advised of the incident by Sergeant Pena. When he arrived, Pena directed him to Respondent, who by that point was standing outside his vehicle. Brown inquired about Respondent's name and command. He noticed that Respondent appeared flush, had watery eyes and was "disheveled." Brown

memorialized this in a Fitness for Duty Report. (Dep't Ex. 2) Specifically, at trial, Brown detailed that Respondent's cheeks were red, his facial expression was drawn in, and that he was "unsteady off his feet," leaning on the vehicle. His jacket was crooked, his shirt was untucked and his pants were sagging. He agreed Respondent was neither resistant nor discourteous and checked that he was cooperative on the Report. He also testified that Respondent's speech was somewhat slurred and drawn out, which he also indicated on the Report, though he confirmed Respondent was able to answer questions. (Tr. 107-14, 127) Finally, as noted on the Report, Brown confirmed he did not smell alcohol on Respondent's breath.

After he completed his interaction with Respondent, Brown spoke to the School Safety Agents about their observations. Based on his observations and the information he had, Brown determined that Respondent was "unfit [for duty] and that he should be placed under arrest for driving while intoxicated." (Tr. 112-17, 124-36) Brown was also present at the hospital when Respondent was asked to submit to testing to determine his blood alcohol content and heard Respondent decline to do so even after warnings from a Highway officer. (Tr. 116-18) He did not know whether the officer read these warnings from a form. On cross, Brown stated he was unaware that the Department of Motor Vehicles gave Respondent his license back or that the DWI charge was dismissed. (Tr. 119-20)

Detective Franklin Wagner, the Highway IDTU officer who was dispatched to conduct testing on Respondent, was the final witness called by the Department. In his three years in Highway, Wagner had made 12 DWI arrests, assisted in over 100 more and tested over 500 individuals for DWI. This was his only case involving a Member of the Service. (Tr. 145-46) Arriving at the hospital, he asked who the arresting officer was and was advised that it was Sergeant Pena. Explaining that supervisors did not generally take arrests, he asked if the arrestee

was a MOS and was told that he was. Wagner stepped out to notify his supervisor before returning to go over the IDTU paperwork with Pena at the emergency room nurses' station. He did not discuss Pena's assessment of Respondent's condition at that time. (Tr. 169) Respondent, he recalled, was standing off to the side, around the corner, about twenty-five feet away. Before proceeding, Wagner waited for Highway supervisors to arrive. When his CO arrived, Wagner and approximately ten other officers, including Respondent, were taken to a conference room. In the conference room, he stood about four feet from Respondent, facing him directly. At that point, Wagner assessed that Respondent had a "moderate" odor of alcohol and bloodshot, watery eyes. He memorialized these observations on his IDTU technician test report. (Dep't Ex. 3) No field sobriety tests were conducted, as "we don't do sobriety tests like the coordination tests in a hospital." (Tr. 155-58)

Wagner acknowledged that he checked "Clear" with respect to Respondent's speech, but acquiesced he only heard him say the word "no" twice. On cross, he stated he did not recall anything specific with respect to Respondent's appearance. (Dep't Ex. 3, Tr. 172)

Wagner advised Respondent he was under arrest for operating a motor vehicle under the influence of alcohol. He asked "if [Respondent] would like to take a . . . blood test," explaining that blood, not breath, tests are conducted when a subject is at the hospital. Respondent said no. At that point, Wagner, reading from paperwork, advised Respondent his license could be suspended or revoked and Respondent again refused the test. Wagner's determination at the conclusion of the interaction, which in its entirety took approximately 90 seconds, was that Respondent was under the influence of alcohol, which he noted on his report. (Tr. 160, 175-76). He explained on redirect that he was "the closest one" to Respondent in the conference room and that everyone else was either behind him or to the side. (Tr. 182)

On cross, he confirmed that at some point, Pena told him he did not believe Respondent was intoxicated and that he had been directed by the duty captain to take Respondent to the precinct. (Tr. 178-79)

Sergeant Luis Pena was called by Respondent. At the outset of direct examination, he recalled that prior to arresting Respondent, he observed that Respondent had watery eyes. He agreed that the watery eyes were the only indicator that Respondent was potentially intoxicated and stated he did not in fact know whether or not Respondent was intoxicated. Captain Brown, however, ordered him to effectuate Respondent's arrest for driving while intoxicated and public lewdness. As the arresting officer, he had to fill out the Intoxicated Driver Examination Report and give his conclusion as to whether Respondent was intoxicated. After reviewing the form, Pena confirmed he had checked no in response to that question. (Tr. 185-87, Res. Ex. C) He also testified similarly at an administrative hearing at the Bronx DMV office nearly nine months after the incident. (Tr. 187-92)

Returning to the topic of his initial engagement with Respondent, Pena then testified that he arrived at the scene after receiving multiple radio runs regarding a male sleeping in a car with his penis exposed in the vicinity of a school. Upon proceeding to the school, he was told by SSA Tramble about what he and Waters had observed. Tramble indicated to Pena that he believed Respondent might be dead. Pena approached the car, which he noted was not parked legally, and observed Respondent in the driver's seat with his coat over his face and his penis exposed and his pants halfway between his waist and knees. He opened the door and woke Respondent up by tapping and shaking his leg. (Tr. 193-95, 201-02)

Respondent stepped out of the car and identified himself as a police officer. Pena told him to pull his pants up, which he did not recall Respondent having issues doing¹. He asked Respondent what he was doing and Respondent replied that he had been partying and drinking the night before and had gone to visit his girlfriend afterward, but she had not opened the door. When asked whether there were any signs of intoxication beyond the watery eyes, Pena detailed that Respondent spoke slowly, not slurring, but “like...tired speech . . . He seemed tired like he didn’t have sleep.” (Tr. 196-97, 202-03) Pena did find Respondent to be unfit for duty on his Supervisor’s Fitness for Duty report. (Tr. 206, Dep’t Ex. 5) He explained that he checked disheveled on the report because Respondent’s penis was exposed and his coat was in his face. He checked normal for speech “because they don’t have slow speech in the boxes.” On cross, he diverged from his direct testimony when he agreed that there was a point when he believed Respondent was intoxicated given the watery and red eyes, slow speech, exposed penis, disheveled clothing and the illegal parking job. (Tr. 207-11) He signed a supporting Criminal Court deposition affirming that Respondent committed the offenses of Operating a Motor Vehicle While Under the Influence of Alcohol and Exposure of a Person, where these observations were also outlined. (Dep’t Ex. 6)

Pena had been a sergeant for a little over a year on the date of this incident and had never before been involved in the arrest of another MOS. He stated that he was “not happy” about having to arrest another officer and wished he had not been in the position, even calling his delegate to the scene to provide guidance. This was also his first DWI arrest. (Tr. 215-21)

Finally, Respondent testified on that on the night of the incident, he finished his tour at Transit District 4 in Manhattan at 2335 hours. He then drove with a friend to a Spanish

¹ At a Department interview on the incident date, Pena told Department investigators that Respondent’s belt was malfunctioning and kept unbuckling as he tried to buckle it. (Tr. 203-04)

restaurant² in the Bronx where they remained until after 0400 hours, consuming beer.³ He drove his friend back to his car in Union Square and made plans via text message to return to the Bronx and stay at his girlfriend's. When he arrived at her residence, he called and texted her multiple times to let her know he was outside but she did not respond. He then got out of his vehicle and yelled her name at the window, but she did not respond. He acknowledged that he was parked in between his girlfriend's residence and a school, between the hazard lines "in a 8 or 10 spot parking spot on a one-way street going down." (Tr. 225-29, 238-40)

He explained that he then reentered his vehicle, deciding to wait for his girlfriend to respond. Respondent kept the engine running because it was cold. He reclined the seat back while he waited and eventually closed his eyes. He estimated that he then fell into a deep asleep around 7 a.m. after texting his girlfriend to come get him from the car when she saw the text. On cross, he recalled opening and urinating out the driver's side door at some point between 7 and 10:30 a.m. He did not get out of the car but simply turned his body to the side and urinated, explaining he was in "a state of sleep" when he did this. (Tr. 229-31, 242-43)

Respondent acknowledged that when he was woken up by police officers around 1030, his pants were at his knees and his penis was exposed. He noted that his pants were loose fitting and would slide down because his belt buckle had an "expanded" hole that prevented the pin from staying in place.⁴ The zipper and button, however, were in working order. (Tr. 230-31, 237, 247) He stated that he was disoriented from being woken up and seeing Sergeant Pena "directly in his face." He denied that he was intoxicated, but confirmed to Pena he had been

² Respondent testified that he did not know the name of the restaurant. (Tr. 239)

³ Respondent also testified that he "sometimes" drank hard liquor and that his drink of choice was Hennessy, but was not asked whether he consumed it on the incident date. (Tr. 238)

⁴ Respondent did not raise the issue of the belt buckle malfunction at his Department interview, but noted he was not specifically asked about it. (Tr. 249-50)

drinking hours before. On cross, Respondent stated that on the day of this incident, he felt the most tired he ever had in his life, though he insisted he was fit for duty. He had not worked overtime the day prior and did not recall his schedule from the previous day. (Tr. 244-45)

Respondent acquiesced that he refused to submit to a blood test at Jacobi Hospital and refused a second time after being given warnings. He stated that his DWI charge was ultimately dropped and he pled guilty to "public urination under the code of exposed penis" and paid a fine. His driver's license was restored at a DMV hearing because, according to Respondent, "the Judge said that Sergeant Pena failed to support the probable cause for a Breathalyzer." (Tr. 235-36, 244)

Specification 2- Operating a Motor Vehicle While Under the Influence of Alcohol

New York Vehicle and Traffic Law § 1192 (3) requires that no person shall operate a motor vehicle while in an intoxicated condition.⁵ Proving that an individual operated a motor vehicle while under the influence of an intoxicant requires a showing that that the driver "is incapable of employing the physical and mental abilities which he is expected to possess in order to operate a vehicle as a reasonable and prudent driver." *People v. McNamara*, 269 A.D.2d 544, 545 (2d Dep't 2000), citing, *People v Cruz*, 48 N.Y.2d 419, 428 (1979), *appeal dismissed*, 446 U.S. 901 (1980). Section 1192 (2) provides that an individual is guilty of driving while intoxicated *per se* where "such person has .08 of one per centum or more by weight of alcohol in the person's blood as shown by chemical analysis of such person's blood, breath, urine or saliva."

⁵ I note that both specifications 1 and 2 were charged under Section 1192 (1), which provides that "No person shall operate a motor vehicle while the person's ability to operate such motor vehicle is impaired by the consumption of alcohol." With respect to Specification 2, the substance of which charges with Respondent being "under the influence of an intoxicant," the citation to 1192 (1), dealing with a driver in an impaired condition, appears to have been a typo. See Tr. 251-52.

The law does not, however, require any particular chemical or physical test to determine whether an individual was intoxicated. The Appellate Division has routinely upheld findings of intoxication based on police officers' testimony regarding a defendant's appearance, condition and disposition. *See People v. Hasenflue*, 252 A.D.2d 829 (3rd Dep't 1998) (defendant's refusal to submit to a breath test, officers' observations of glassy eyes, strong smell of alcohol, slurred speech, combined with defendant's failure to pass the field sobriety tests and "aberrant behavior in the police station" were deemed sufficient evidence supporting the jury's conclusion that defendant operated his vehicle while intoxicated); *see also People v. Hamm*, 29 A.D.3d 1079 (3d Dep't 2006) (defendant's erratic operation of his motor vehicle, his admission that he had consumed alcohol, his physical appearance and condition, his failure to pass the field sobriety tests, and his refusal to take the breathalyzer test, provided legally sufficient evidence supporting the charge of DWI).

This tribunal has previously held that the standard to prove intoxication is a "high one" and that absent a breath or blood analysis of blood alcohol content, Respondent must exhibit "several physical indicia of intoxication" in order to substantiate a finding that an officer was driving under the influence of an intoxicant. *See Case No. 7410/12* (June 24, 2015) ("Absent a breath or blood analysis of blood alcohol content, Respondent must exhibit several physical indicia of intoxication."), citing, *Case No. 82355/06* (Sept. 2, 2011) (finding the Department failed to prove intoxication where, absent a breath test, responding officer noted some, but not several, physical indicia of intoxication, including erratic driving, a smell of alcohol and watery eyes). There is no specific requirement, though, of what constitutes sufficient physical indicia and the fact-finder must therefore carefully contemplate all relevant facts and circumstances.

Here, I find that significant, credible evidence overwhelmingly indicates that Respondent operated his motor vehicle while under the influence of an intoxicant, given the physical state in which Respondent was found. Cf. Case No. [REDACTED] (finding the Department failed to prove an officer who was pulled over for speeding and ultimately arrested for DWI was intoxicated where one of multiple responding officers reported the respondent had alcohol on his breath and slightly watery eyes but did not slur his speech and was responsive). In this instance, Respondent was discovered in the middle of the morning, on what he himself described as a "freezing" late November day, asleep in his vehicle, parked near an elementary school, with his pants around his thighs, his penis and much of his stomach exposed and his jacket pulled over his head. By his own testimony, he was there for several hours until he was discovered by school parents and School Safety Agents, with his NYPD parking plaque visible on his dashboard. He told Sergeant Pena that he was drinking and "partying" into the wee hours of the morning at a restaurant that he was unable to name before driving from the Bronx to Union Square and back to the Bronx, allegedly to his girlfriend's house, even though he lives in Staten Island. He admitted to this tribunal that at some time between 0700 and 1045 hours, he urinated out the door of his car by simply shifting his body in the driver's seat, rather than exiting the vehicle. He could not confirm whether he put his penis away after doing so, but was later found exposed. This information from Respondent alone would be enough for this tribunal to come to the conclusion that it is more likely than not that Respondent was intoxicated, but testimony from other witnesses further bolstered the Department's case.

Two school safety agents and two Uniformed Members of the Service testified regarding their observations of Respondent at the scene, in addition to the officer who responded to the hospital to attempt to administer blood alcohol content testing. The School Safety Agents

credibly detailed that Respondent was utterly unresponsive in the driver's seat of his vehicle with his jacket pulled over his head and his penis exposed and remained in this state despite prolonged efforts to wake him by banging on windows, nudging him and even rocking the car for a total of about 20 minutes. SSA Waters also recalled Respondent's eyes being red, and SSA Tramble testified that Respondent's breathing was shallow, even telling Sergeant Pena that Respondent might be dead, and described Respondent as disoriented after he eventually was awakened. While they did not explicitly describe Respondent as "intoxicated" at trial, the state in which they both described discovering him can reasonably be described as indicative of intoxication.

Captain Brown, who did interact directly with Respondent, testified in a straightforward and professional manner without any hint of bias, that he believed Respondent was intoxicated and unfit for duty, describing Respondent as unsteady on his feet, having a flush complexion and watery eyes, speaking in a somewhat slow and slurred manner and having a disheveled appearance with respect to his clothing.

Detective Wagner, who arrived at the hospital hours later to conduct blood alcohol testing, detailed that he smelled a moderate scent of alcohol⁶ emanating from Respondent when he twice refused to submit to testing and observed his eyes to be bloodshot. He concluded that Respondent was under the influence of alcohol. (Dep't Ex 3)

After considering these accounts together, the tribunal finds that it is more likely than not that Respondent was intoxicated based on the state in which he was discovered and the admissions he made.

⁶] note that Wagner was the only witness to smell alcohol on Respondent's breath. However, he was not shown to have any motive to lie or embellish his observations and was not revealed to have had any prior interaction with Respondent. It is logical that his observation can be attributed to the fact that as a Highway officer and frequent IDTU test administrator, he had more training and experience than anyone else present with detecting the signs of intoxication and the scent of alcohol.

In making this finding, I have also taken into account the testimony of Sergeant Pena, who provided a more problematic account, vacillating both in his documents at the time of the incident and at trial as to whether Respondent was intoxicated. He stated at trial that Respondent's eyes were watery and that he did not smell alcohol on Respondent. In a Fitness for Duty report, he checked Respondent's speech was normal, though he described it as "slow" at trial. He checked "no" on the Intoxicated Driver Examination Report in response to whether Respondent was under the influence of alcohol but signed a Criminal Court Affidavit in support of charging Respondent with a DWI the next day. (Dep't Ex. 6, Res. Ex C). On cross, he stated that he did believe Respondent was intoxicated based on his red and watery eyes, slow speech, exposed penis, disheveled clothing and illegal parking job after testifying on direct that the only potential indicator of intoxication was Respondent's watery eyes. These inconsistencies appear to be at least in part attributable to Pena's admitted discomfort with arresting a MOS for the first time as a new sergeant at the time, which caused him to call his union delegate to the scene, in addition to the fact that this was his very first DWI arrest. Regardless of his reasons, his assertions and conclusions are so jarringly inconsistent that they cannot be credited with any real weight.

In sum, the credible evidence regarding the state in which Respondent allowed himself to be found - unresponsive hours after admittedly consuming alcohol, with an exposed penis near a school in the middle of the morning with his NYPD parking plaque visible for anyone to see - is in no way consistent with the behavior one would reasonably expect from a sober uniformed member of the service, capable of operating a motor vehicle as a reasonable and prudent driver. It is, however, entirely consistent with that of an individual who was intoxicated after a night of drinking and unable to drive in the manner required by law. Respondent's explanation that he

was simply "tired" is incredulous, at best. Furthermore, if Respondent's excuse was true, it fails to explain why he refused blood alcohol content testing, as he did.⁷ Therefore, based on the above, Respondent is found Guilty of Specification No. 2.

Specification 1- Operating a Motor Vehicle While Impaired

Respondent is also charged with the lesser offense of operating a motor vehicle while his ability was impaired by alcohol. A finding that a driver was impaired requires a lesser showing than intoxication -- simply that the driver's ability to operate a motor vehicle was "impaired to some extent". *People v. McNamara*, 269 A.D.2d 544, 545 (2d Dep't 2000), citing *People v. Cruz*, 48 N.Y.2d 419, 428 (1979), *appeal dismissed*, 446 U.S. 901 (1980). As the tribunal has determined that the Department proved that Respondent operated a motor vehicle while under the influence of an intoxicant for the reasons set forth above, he is therefore also found Guilty of operating a motor vehicle while his ability was impaired.

Specification 4- Unfit for Duty

For similar reasons, Respondent is found Guilty of consuming an intoxicant to the extent he was unfit for duty. While Respondent denies that he was intoxicated, the two supervisors who prepared Fitness for Duty Reports determined Respondent was *unfit* for duty. No evidence was presented at trial that the supervisors had colluded or had motive to lie or exaggerate. I find their assessments credible when taken together, despite Sergeant Pena's vacillating as to whether Respondent was intoxicated as discussed above, in combination with the very credible testimony from the School Safety Agents about the state in which they discovered Respondent. See *Case No. [REDACTED]* (finding Respondent *unfit* for duty based on a supervisor's assessment that he was impaired due to the consumption of alcohol and therefore *unfit*); *Case*

⁷ See *infra* pp. 20-21.

No. [REDACTED] (finding Respondent unfit for duty due to alcohol consumption, where there was no breath or blood test, based on the determinations of four supervising officers, even where there were certain technical problems with the SFDR's); *Case No. [REDACTED]* (finding Respondent unfit for duty due to overindulgence in an intoxicant based on the reports of two supervising officers). Hours after being out drinking with a friend, Respondent was found sleeping in a vehicle near an elementary school with his penis exposed and it took prolonged attempts by multiple individuals to rouse him from this state. It is unequivocally clear to this tribunal that he was not fit for duty at this time and the credible evidence indicates his unfitness resulted from his consumption of alcohol earlier that morning.

He is therefore found Guilty of Specification No. 4.

Specification 3- Refusal of Blood Test Following DWI Arrest

Respondent admitted to twice refusing to submit to a blood test to determine his blood alcohol content, even after being warned of the consequences of doing so. He was not asked why he refused and offered no explanation.

Respondent's counsel points to the fact that the DMV restored Respondent's driver's license at a "refusal hearing" at which Sergeant Pena testified as precluding a finding of guilt on this specification. I do not find the restoration of Respondent's license at a DMV hearing which, by Respondent and his counsel's descriptions, had a far less developed record than the present proceeding, to be in any way binding on this tribunal or dispositive on the issue of whether Respondent's refusal was wrongful or constituted conduct prejudicial to the good order, efficiency or discipline of the Department. In *Case No. [REDACTED]*, this tribunal found a police officer guilty of wrongfully refusing to submit to a Breathalyzer test after being arrested on a suspected DWI even where a DMV ALJ had previously ruled that the arrested

officer did not refuse testing and reinstated his license. The hearing officer in that case emphasized, “[t]hat the two hearings were for very different purposes. The present matter is an administrative disciplinary hearing involving Respondent's employer, the Department, and the DMV hearing was for the discrete issue of determining whether to restore Respondent's driver's license. Accordingly, the DMV result is neither binding on nor particularly enlightening for this tribunal.”).

At the time of his arrest, Respondent was the subject of a criminal investigation for driving while intoxicated. It was as a result of that investigation that he was asked to take the blood test. By refusing, he impeded the Department's ability to efficiently carry out its investigation and his refusal was, in the view of this tribunal, conduct prejudicial to the good order, efficiency, or discipline of the Department. *See Case No. [REDACTED]*. (In finding officer guilty of conduct prejudicial to the good order, efficiency or discipline of the Department when he refused to take a blood test following a DWI arrest, the hearing officer reasoned, “Respondent exercised [a] limited [New York] statutory right to refuse testing. Just as there are consequences to citizens for refusing under §1194 [including the potential loss of one's license], there are [additional] consequences to MOS in the Department who have taken an oath to follow the laws of New York.”). Respondent is therefore found guilty of Specification 3.

Specification 5- Exposed Penis in Public

Respondent, having admitted to being asleep in his vehicle with his penis exposed and having pled guilty to lewdness in criminal court, is found Guilty as charged in Specification No. 5. I make this finding having considered the testimony that Respondent's belt buckle was possibly malfunctioning. Respondent agreed the zipper and button on his pants were functional, which would have aided him in avoiding indecent exposure. Moreover, Respondent, as a

member of the Department, was obligated to follow the law and avoid public exposure or lewdness but made no attempt to do so.

PENALTY RECOMMENDATION

In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 240 (1974). Respondent was appointed to the Department on January 9, 2006.

Respondent has been found guilty of driving while under the influence of an intoxicant, driving while his ability was impaired by alcohol, refusing to submit to a blood test, being unfit for duty due to consumption of alcohol, and exposing himself in public. It must be emphasized that Respondent's behavior was an utter embarrassment, not only to him personally, but also to the Department. Respondent, with his Department parking plaque on his dashboard, was discovered near an elementary school in an unresponsive state with his penis exposed so publicly that parents were compelled to report him to School Safety Agents. This incident and, more specifically, the state in which Respondent was found raises grave concerns about whether Respondent possesses the good judgment, prudence and maturity that is required of uniformed members of the Department. Compounding these concerns is the fact that Respondent was already disciplined for very similar misconduct in 2012 when he negotiated a penalty whereby he forfeited thirty (30) pretrial suspension days without pay; ten (10) vacation days, was placed on one-year dismissal probation and agreed to cooperate with breath testing and counseling, after pleading guilty to, (i) wrongfully operating a motor vehicle while his ability was impaired by an intoxicant; (ii) wrongfully operating a motor vehicle while under the influence of an intoxicant; (iii) refusing to submit to a breathalyzer and physical coordination examination; (iv) consuming

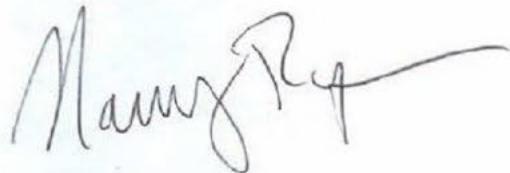
an intoxicant to the extent that he was unfit for duty; and (v) operating his personal vehicle without valid inspection and registration stickers affixed to the vehicle's windshield.

Given that this is Respondent's second case involving driving while his ability was impaired by alcohol, I cannot recommend that he remain a member of this Department. Respondent has shown a pattern of behavior that demonstrates a complete inability to follow the laws he is sworn to uphold and to adhere to the Department's standards for its members. Separation is also consistent with recent Department precedent. *See Case No. [REDACTED]*

[REDACTED] (Nineteen-year police officer with two prior alcohol-related adjudications where he was deemed unfit for duty due to alcohol consumption, forfeited 60 suspension days, was placed on one year dismissal probation, and agreed to immediately file for vested-interest retirement for driving while impaired by an intoxicant, refusing to submit to a blood test, being unfit for duty while armed, and failing to carry his Department identification card. Respondent "continued to exhibit behavior that demonstrates an inability to discharge his duties as a uniformed member of the service."); *see also Dep't of Correction v. Ortiz*, OATH Index No. 986/07 (June 25, 2007), *aff'd*, NYC Civ. Serv. Comm'n item No. CD08-22-A (May 9, 2008), (In recommending termination for a Corrections officer who had been found guilty of operating a motor vehicle while impaired by alcohol and failing to provide timely notification of his arrest, the hearing officer emphasized that respondent "ha[d] already been given a significant suspension for alcohol-related misconduct three years ago. Instead of taking advantage of the "second chance" afforded to him . . . respondent has proven that he is reckless and lacks judgment. In light of the seriousness of this behavior and because this is the second time respondent has engaged in alcohol-related misconduct, I find that termination is the appropriate penalty." The ALJ also noted that "Respondent's failure to accept responsibility is an aggravating circumstance in

assessing the appropriate penalty."). Therefore, it is the recommendation of this tribunal that Respondent be **DISMISSED** from employment with the Department.

Respectfully submitted,



Nancy R. Ryan
Assistant Deputy Commissioner Trials





POLICE DEPARTMENT CITY OF NEW YORK

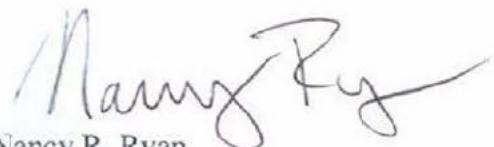
From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER WAYNE ROACH
TAX REGISTRY NO. 940645
DISCIPLINARY CASE NO. 2015-14794

Respondent was appointed to the Department on January 9, 2006. He received a 4.0 overall rating of "Highly Competent" on his annual performance evaluation in 2016 and 3.0 ratings of "Competent" in 2014 and 2015. He has received two medals for Excellent Police Duty and five medals for Meritorious Police Duty. [REDACTED]

In 2012, Respondent negotiated a penalty where he forfeited thirty (30) pretrial suspension days without pay; ten (10) vacation days, was placed on one-year dismissal probation and agreed to cooperate with breath testing and counseling, after pleading guilty to, (i) wrongfully operating a motor vehicle while his ability was impaired by an intoxicant; (ii) wrongfully operating a motor vehicle while under the influence of an intoxicant; (iii) refusing to submit to a breathalyzer and physical coordination examination; (iv) consuming an intoxicant to the extent that he was unfit for duty; and (v) operating his personal vehicle without valid inspection and registration stickers affixed to the windshield. Following the underlying incident in that case, Respondent was placed on Level 2 Discipline Monitoring from May 3, 2010 to January 5, 2012.

Respondent was suspended and is currently on modified duty status in connection with the instant charges. He was again placed on Level 2 Discipline Monitoring on March 18, 2016 in connection with these charges. That monitoring remains ongoing.

For your consideration.



Nancy R. Ryan
Assistant Deputy Commissioner Trials